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JOHN F. DAVIS, C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

WILLIAM J. DONOHO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, William J. Donoho, prays that a writ of certiorari issue to review the order and judgment entered by the Court of Appeals for the Sixth Circuit on January 24, 1968, affirming a judgment of the District Court for the Middle District of Tennessee, sentencing petitioner to a period of 15 months imprisonment on each of 5 counts of an indictment and to a fine of $500.00 on each count. The sentences of 15 months on each count are to run concurrently. Petitioner was indicted in the District Court, under a 5-count indictment, for violation of 26 U. S. C.,

Sec. 7206 (1), in that he willfully subscribed to a false income tax return for the years 1957, 1958, 1960, 1961, and 1962. He was convicted upon jury verdict.

OPINIONS BELOW.

The District Court filed no formal opinion. However, the remarks of the District Judge in overruling defendant's motion for a new trial, were ordered transcribed by the court reporter, and the District Judge ruled that they would constitute the order of the Court in overruling the motion for a new trial. This order was entered November 29, 1966. The Court of Appeals for the Sixth Circuit delivered an opinion affirming the judgment of the Trial Court on January 24, 1968. It is from this judgment that petitioner ask this Court to grant a review by writ of certiorari. In compliance with Rule 23 (i) of this Honorable Court, copies of the opinions of the District Court and of the Court of Appeals may be found as an appendix to this petition. The District Court's order of "Judgment and Commitment" is also appended.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 24, 1968. An order has been entered staying the mandate of the Court pending the filing of this petition. This petition has been filed within the time prescribed by the Rules of this Honorable Court, specifically Rule 22 (2). The jurisdiction of this Court is invoked under the provision of 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

The questions presented for review by this Court are as follows:

1. When the Government attempts to prove a criminal violation of Internal Revenue Code Sec. 7206 (1) by the

"specific items of income" method alone, having abandoned immediately before trial its declared intention to corroborate for two of the indictment years by the "net worth increase plus expenditures" method, whether the defendant should be allowed to prove as a defense to these counts of the indictment, by competent witnesses, charts and summaries, his own net worth computation, to show, as a defense, that no additional income was received other than that reported.

2. Whether defense counsel should be allowed to comment, in closing argument to the jury, on the Government's abandonment of "net worth and expenditures" computations for two out of five indictment years, the Government having before declared, in six bills of particulars, its intention to use this proof for corroborative purposes.

STATUTE INVOLVED.

The only statute involved is that for the violation of which petitioner was convicted, Title 26 U. S. C., Section 7206 (1), Internal Revenue Code:

> Any person who—
>
> (1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE.

Petitioner was indicted in the United States District Court, Middle District of Tennessee at Nashville, under a five count indictment, for violation of 26 U. S. C., Sec. 7206 (1) in that he willfully subscribed to a false income tax return for the years 1957, 1958, 1960, 1961, and 1962. The case was originally set for trial, on petitioner's plea of not guilty, on October 5, 1964. That trial resulted in a mistrial on October 7, 1964.

A bill of particulars was filed by the Government on June 30, 1964. Amended bills of particulars were filed on the following dates: August 27, 1964; September 29, 1964; November 9, 1964; May 18, 1965; October 6, 1966; and October 21, 1966. The last bill of particulars was filed on a Friday before the trial was to begin on Monday, October 24, 1966. In the six separate bills of particulars filed by the Government from June 30, 1964 to October 6, 1966, the Government declared its intention of proving false tax returns for defendant, for at least two of the indictment years, by the "net worth plus expenditures" method. Then on October 21, 1966, in its seventh and final bill of particulars, the Government totally abandoned any statement to the effect that the Government would use net worth proof.

Trial was subsequently begun, and the Government attempted to prove its case by the testimony of a number of law violators in the Nashville area, who were engaged in the business of prostitution, illegal gambling, and illegal sale of whiskey. These law violators testified that they had given payoffs directly or indirectly to the defendant during the indictment years. These payoffs were said to be made for police protection and were made while the defendant was a high-ranking officer in the Nashville police force.

The parties stipulated, among other matters not here important, that none of the income reported on the tax returns for the indictment years came from the law violators in the form of protection payments, and that the tax returns for the indictment years did not reflect receipt of any such income by the defendant.

The defendant took the stand in his own behalf and denied that he had ever taken payoffs or protection money. He introduced a number of witnesses whose testimony reflected unfavorably on the character—or the reputation for truth and veracity—of some of the Government's witnesses.

The defendant then offered to introduce, through his accountant and other disinterested witness, a computation of net worth and expenditures for the defendant for the indictment years 1960 and 1961, and evidence to support these figures; in addition, there was also offered the testimony of the defendant himself as to some of these figures. This offer of proof was denied by the District Court. The defendant then produced some good character testimony and the Government put on a few rebuttal witnesses. At the close of the proof, the defendant, through his counsel, informed the Court that he was renewing his offer to produce net worth and expenditures, and, in addition, that he intended to argue before the jury that the Government had abandoned its intention, as stated in the first six of seven bills of particulars filed in the cause, to show by corroborating proof extra income received for the years 1960 and 1961 by the net worth and expenditures method. The Court refused to allow defendant's counsel to argue this abandonment by the Government of its former position.

Defendant was convicted upon a jury verdict upon all counts of the indictment, and received a sentence of 15-months imprisonment on each count, the sentences to run

concurrently. Defendant was also ordered to pay a fine of $500 on each count, or a total of $2,500.00.

Notice of appeal was subsequently filed to the Sixth Circuit Court of Appeals, and upon briefs and argument of counsel, the judgment of the District Court was affirmed on January 24, 1968. It is from this judgment, that defendant presently seeks a writ of certiorari from this Honorable Court.

REASONS FOR GRANTING THE WRIT.

1. The opinion of the Court of Appeals is in conflict with its opinion in the case of UNITED STATES v. MOODY, 339 F. 2d 161 (6th Cir. 1964).

At the close of defendant's own testimony, his counsel offered to prove by a net worth computation that the only taxable income received by the defendant during the indictment years 1960 and 1961 was substantially what he reported on his income tax returns for those years—or at least that he received no **more** income than that which he reported (Official Transcript—hereinafter, "Tr."—pp. 505-515). This he proposed to do by offering the testimony of Mr. Raymond J. Foust, a Certified Public Accountant, and certain charts and summaries of calculations prepared by Mr. Foust; the testimony of other disinterested witnesses (the record will show that they were already under subpoena) as to expenditures, disbursements, and assets of the defendant during and at the beginning and ending points of the periods in question; and the testimony of the defendant himself. What, in essence, he proposed was a defense or a rebuttal of the case of the Government by a different method of proof than that used by the Government. The defendant attempted to do what he had a right to do: establish as a defense that he owed no tax in addition to what he had

paid on his returns, and so did not willfully swear to a false return. **United States v. Moody**, 339 F. 2d 161 (6th Cir. 1964).

Petitioner submits that the **Moody** case was controlling in his appeal and for this reason alone a reversal of the District Court judgment was required. In **Moody**, the Government attempted to prove its case by a "bank deposits" method, closely similar to the method of "specific items of income" that was used by the Government in the instant case. The Court of Appeals held:

> Taxpayer-defendant's proffered proof consisted in part of a purported net worth study covering the four years involved. The trial court took the view that this case was a bank deposits case and that a net worth computation was irrelevant and therefore inadmissible, except for the purpose of showing lack of willfulness. But the terms "bank deposits case" and "net worth case" are not descriptive of the case itself. The case itself is a willful tax evasion case. The two quoted terms are descriptive of methods of computation. Either can be used by either the Government or the taxpaper as a means of computing income. The use of one method of computation by one party does not foreclose the use of another method by the other party. The trial judge was in error in his view in this respect.
>
> 339 F. 2d at 162.

While the indictment in **Moody** was apparently based upon Internal Revenue Code Section 7201, and the indictments in the instant case were based upon Section 7206 (1), under both sections there must be an incorrect statement of income received and a consequent deficiency in tax. A violation of either section can be shown—as the Government attempted to do in the instant case—by evidence of the receipt of income that was not reported.

Petitioner submits that the following is a fair summary of the reasons given by the District Court in disallowing net worth proof by the defendant:

(1) The proof would include the testimony of the defendant, whose credibility is already at issue since he denied receiving any bribes; therefore the proof would have no probative value (Tr. pp. 507-508).

(2) A stipulation was entered into before the trial which states as follows: "The parties further stipulate that none of the income reported on these tax returns by the defendant, William J. Donoho, and wife, came from law violators in the form of protection payments and the tax returns do not reflect receipt of any such income by the defendant"; this stipulation formed the only issue in the case, that being whether or not the defendant received any bribes in the indictment years (Opinion of District Court, pp. 2-4).

As to the first reason, the District Court erred in that it "appears to confuse the function of the court with that of the jury." **Gariepy v. United States**, 189 F. 2d 459, 462 (6th Cir. 1951). What inferences may be drawn from the fact that the same defendant who testifies as to certain expenses has also testified that he did not receive bribes are for the jury to draw and not the court. To assume that net worth proof based partially on the defendant's testimony is not probative is to assume that defendant's testimony is unreliable, that he is going to lie under oath. Of course, the direct opposite is the assumption; that is, that the defendant, like every witness, is going to tell the truth. No doubt the Government's investigation in a case of this nature can produce statements or admissions of the defendant that would make good fodder for cross-examination and serve to reflect upon the accuracy of his testimony. The District Court's first objection, then goes to the weight of defendant's

testimony—the sole province of the jury—and not to its admissibility.

There is always an element of reasonable doubt in a net worth case because all expenditures and disbursements cannot be accurately accounted for. This fact was recognized in the leading net worth case of **Holland v. United States**, 348 U. S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954), when this Court refused to require the Government to negate every reasonable explanation of the taxpayer as to cash on hand or expenditures inconsistent with guilt. Summaries and estimates used by the Government have been ruled permissible; and when coupled with certain accurate evidence and based upon this evidence, they will sustain a net worth prosecution. **Kampmeyer v. United States**, 227 F. 2d 313, 317 (8th Cir. 1955); **Remmer v. United States**, 205 F. 2d 277, 287 (9th Cir. 1953); **Gariepy v. United States**, *supra*; **Smith v. United States**, 239 F. 2d 168 (6th Cir. 1956). To allow the Government to sustain a net worth case with some lack of accuracy or some gaps in calculations, but to deny the same as a defense where the only "gap" is the credibility of the defendant himself is surely to deny that defendant the equal protection of the laws guaranteed him by the Fourteenth Amendment.

As to the District Court's second reason for disallowing this proof, it is submitted that the stipulation has changed nothing in regard to what the Government must prove to sustain its case. The defendant signed tax returns, under oath, that stated a certain amount of income from certain sources—and a tax was paid on that income. He swore that this was **all** the taxable income he received. The stipulation is that no bribes (if any were received) were reported as a part of that income and that nothing in the return reflects the receipt of any bribes; this fact is taken as proved; it is admitted by both sides. If, in addition, the Government alleges that bribes were received

that were **not** reported on the tax returns, the defendant is not precluded by that stipulation from denying receipt of bribes by all competent proof. If he had received such bribes, presumably they would show up on a net worth study. Such a study would either show additional income not reported or corroborate what was reported. Appellant submits that the latter result would be accomplished and that he is entitled to so prove.

It is submitted that by virtue of the holding of the Court of Appeals in **United States v. Moody**, *supra*, and the foregoing reasons supporting the allowance of defendant's offer of a net worth study, the decision of the Court of Appeals must be reversed and the cause remanded for a new trial.

2. The District Court refused to grant petitioner his right to call to the jury's attention an important inference—indeed a PRESUMPTION—to be drawn from the Government's failure to produce certain proof peculiarly within its power.

In six (6) Bills of Particulars filed by the Government from June 30, 1964, to October 6, 1966, the Government declared its intention of proving false tax returns for the defendant, for at least two of the indictment years, by the net worth plus expenditures method. Then on October 21, 1966, on a Friday before the trial was to begin on Monday, October 24, the Government filed its seventh and final Bill of Particulars. That Bill of Particulars totally abandoned any statement to the effect that the Government would use net worth proof. It is appellant's contention that defense counsel was entitled to argue that the inference could properly be drawn that net worth proof would be unfavorable to the Government, and that the Government abandoned it for this reason. This is proper argument and defendant was entitled to assert it, particularly in view of the District Court's refusal to allow

defendant to introduce his own net worth study. It is proper argument under the theory that a party may comment to the jury on the adverse party's failure to produce a witness whose testimony would shed light on a particular transaction; the inference is that the witness' testimony would not be favorable to the party who failed to produce it.

> The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.
>
> **Graves v. United States**, 150 U. S. 118, 121, 14 S. Ct. 40, 37 L. Ed. 1021 (1893).

More recent cases, such as **Smith v. United States**, 234 F. 2d 385, 389 (5th Cir. 1956); and **Lawson v. United States**, 248 F. 2d 654 (D. C. Cir. 1957), reiterate this rule. In **United States v. Jackson**, 257 F. 2d 41 (3rd Cir. 1958), it was held error for the court to refuse to allow defense counsel to argue that the Government failed to produce an informer who apparently had helped in the building of the Government's case.

In **Morei v. United States**, 127 F. 2d 827 (6th Cir. 1942), a narcotics prosecution, Government agents induced a man named Sargent to act as a "plant" to produce some evidence on one of the defendants. At the trial there arose a dispute as to the gist of the conversations that the defendant had with Sargent. Sargent was never produced by the Government. In reversing the conviction, the Court of Appeals noted at 830:

> It may be observed that the failure of the government to call Sargent, a most important witness in view of the disputed testimony, was unexplained, and,

under the circumstances, every inference must weigh against the contention of the government on this phase of the case.

Admittedly, if the evidence which the Government failed to produce is available to **both** parties, defense counsel's drawing of unfavorable inferences would have little, if any, merit because the Government could well ask why defendant did not himself put on that proof. The following quote from **Fowler v. United States**, 352 F. 2d 100, 112 (8th Cir. 1965), illustrates this analysis:

> Nowhere is there authority for the proposition that the government must prove its case by every possible method. True, the government did indicate to appellants that it intended to utilize bank deposit analysis at trial. However, it is not claimed by appellants that the failure by the government to do so was prejudicial to them. In fact, the appellants had access to the government's bank account analysis and to the documents making up such analysis. If vital to their defense, appellants could have presented this evidence themselves since the evidence was **equally available to both parties**. (Emphasis supplied.)

However, the corollary of this proposition is equally true —that is, that where the evidence is **not** available to one party, the unfavorable inference against the party who could produce it is proper. The evidence of a net worth study was not available to the defense in the instant case **because the District Court would not allow defendant to produce it.** And, of course, the jury could not know of this refusal of the Court to allow it to introduce net worth proof.

The **Fowler** case, in fact, appears to agree with appellant's position in the case at bar when it states in a footnote at 112:

> We concur with the following from II Wigmore on Evidence, 3d Ed., Section 228, pp. 169-171, feeling

that it applies to failure to produce evidence as well as to failure to call witnesses:

"It is commonly said that no inference is allowable where the person in question is **equally available** to both parties; * * * the more logical view is that the failure to produce is **open** to an inference **against both parties**, the particular strength of the inference against either depending on the circumstances."

A supplemental question, which the Government brought to the attention of the Court of Appeals, but which was never reached by the Court of Appeals, was whether when there are error-free counts of a multi-count conviction, and a defendant receives concurrent sentences on each of these counts, his conviction should be affirmed even though there is error in some of the counts. Petitioner insists that if he had been allowed to prove his net worth and expenditures for the years 1960 and 1961, and had been allowed to argue the Government's abandonment of this proof for the same indictment years, he could have shown to the jury a break in the "pattern" of apparent evasions over a number of consecutive years. If a defendant can destroy, or show facts that would tend to discredit, the testimony of a number of law violators for at least two of the indictment years, there is a strong possibility that a jury would find the testimony of these law violators without credit for the other indictment years. The error involved, then, cannot be limited or isolated to the counts involving the years 1960 and 1961; in fact, some witnesses who testified against the defendant for the indictment years 1960 and 1961 also testified against him in other indictment years.

The foregoing proposition is not inconsistent with the cases of **Hirabayashi v. United States**, 320 U. S. 81, 85

(1943), **United States v. Jett,** 352 F. 2d 179, 183 (6th Cir. 1965), cited by the Government in its brief before the Court of Appeals. These cases did not involve some of the factors that are a part of the instant case. For instance, in the **Jett** case a non-jury case, there is no indication that error on two counts had any "spill-over" effect on the error-free count. Since the Court of Appeals held there was no error at all in **Jett,** it was not required to comment upon what effect error had on the faultless count. Also **Jett,** unlike the instant case, was concerned with sufficiency of evidence on two out of three counts—the indication being that one count could stand alone on its own evidence. A close examination of **Jett** truly does indicate that there was no overlapping evidence into the good count.

The proposition of "overlapping" or "spill-over" is more definitely set forth in **United States v. Hines,** 256 F. 2d 561, 563 (2nd Cir. 1958), and **United States v. Bottone,** 365 F. 2d 389, 394 (2nd Cir. 1966), that Court stating that "we will reverse for a material error on another count 'whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings.'" In the **Bottone** case, the Court indicates that, for it to affirm, there must not be any doubt that a conviction would have been sustained on the good count had it been standing alone.

United States v. Barash, 365 F. 2d 395, 399, 403 (2nd Cir. 1966), states that "the doctrine of one good count is not a fetish":

> "We are far from being certain that the restriction and deprecation of the impeachment of Clyne, the chief Government witness, and the admission of the Lupescu hearsay statement in the testimony of Coady,

the undercover agent, did not have a spill-over effect on the DeSibio counts; that the jury might have exercised its prerogative of leniency if these charges alone had been before it; or that the judge would have given the same sentence for convictions on these two aiding and abetting counts as he did for those on the twenty-six, including convictions for bribery. Applying the rule of United States v. Hines, supra, 256 F. 2d 561, we think our duty to 'require such further proceedings to be had as may be just under the circumstances,' 28 U. S. C., Sec. 2106, demands a reversal and a remand for a new trial."

Some cases have stated the proposition in terms of "harmless error". In **Edwards v. United States**, 265 F. 2d 302, 308 (9th Cir. 1959), it was held:

> "In reversing the judgments entered in this case and remanding the case to the district court for a new trial, we are mindful of the general rule stated in Kiyoshi Hirabayashi v. United States, 320 U. S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774; Fisher v. United States, 9 Cir., 254 F. 2d 302, and many other cases, that where a defendant is convicted on several counts of an indictment and the sentences are ordered to run concurrently it is unnecessary on review to consider the validity of the sentences on all counts if the sentence on one of them is sustainable. This rule, however, has no application to this case for the reasons hereinabove set forth. The principle of law on which we rely is set forth in Wolcher v. United States, 9 Cir., 200 F. 2d 493, to the effect that where a reviewing court cannot say that a judgment of conviction was not substantially swayed by error it must conclude that the errors are not harmless. Our view of this case was well stated in the Wolcher case at page 500, as follows:

'We cannot say that these errors are those which "(do) not affect substantial rights" and hence that they should be disregarded. The errors here listed require a reversal since in our judgment "the error might have operated to the substantial injury of the defendant." United States v. Grady, 7 Cir., 185 F. 2d 273, 275.' "

To hold exceptionless the doctrine of one good count would be to approve this situation: One faultless count can save a trial court from the embarrassment of reversal if it merely passes a concurrent sentence on both the good and bad counts. This situation would inevitably bring about an easing of strictness on proper procedure, since a trial court can simply correct error by passing concurrent sentences.

CONCLUSION.

For the reasons stated, it is urged respectfully that the writ of certiorari to the Court of Appeals for the Sixth Circuit be granted and that the decision of the Court of Appeals be reversed.

Respectfully submitted,

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